No. 326

In the

Supreme Court of the United States

October Term, 1955

GUY A. THOMPSON, Trustee, The St. Louis, Brownsville & Mexico Railway Company, Debtor,

Petitioner,

v.

GEORGE C. MOORE, SR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

Being unable to concur with all of the statements in Petitioner's Statement of the Case, and in order that Your Honors may have a correct and full picture of the nature of this case and of the established facts as they relate to

the questions raised by Petitioner, the following Statement of the Case is respectfully submitted:

Respondent entered Petitioner's employ as a railroad conductor on, and held seniority as such from, November 1, 1929, under a collective bargaining contract which became part of his employment contract. (R. 12, 25, 192.) Such contract, which was in force at the time of the trial, is admitted to be a continuing contract. (R. 12.)

In January, 1946, Respondent, then fifty-four years old, was injured in service (R. 115-116), but continued working despite his injury until 1949, when he voluntarily laid off for convalescence (R. 258). During the time he laid off, he drew annuity payments from the Railroad Retirement Board (R. 80).

Having recovered from his injury, on February 15, 1951, he presented himself to Petitioner's Superintendent to return to work under his contract (R. 263). At Petitioner's insistence, he submitted to an examination by Petitioner's surgeon at Kingsville, Dr. C. M. Sublett. Upon presenting himself to Dr. Sublett, the latter, using profanity, angrily informed Respondent that he was not going to pass him for return to work; that Petitioner would not let him go back to work anyway. (R. 269, 270, 271.) Dr. Sublett then made only a most perfunctory examination of Respondent, informing him that he was not going to pass him because of "weakness of hands and shortness of breath," giving no other reasons at the time. (R. 272, 274.)

Respondent immediately had himself examined by other doctors, including the examiner for another railroad, who

found and reported him (in writing) to be in good health and sound physical condition. (R. 276, 278, 296, 298.) Respondent again reported to the Superintendent and presented such medical reports to him, renewing his request to return to work, but the Superintendent refused even to look at them (R. 282-284), stating in substance that the matter was closed (R. 293).

Over a period of approximately two years, Respondent undertook to obtain Petitioner's permission to return to work, having himself examined by various highly reputable doctors, including specialists and including examiners for other railroads, procuring written reports of his examinations by them, all of which showed him to be in good health and sound physical condition, all of which reports were tendered to Petitioner. (R. 97, 330, 429-434, 451, 462-463, 557, 569, 743-745, 765, 767.) But Petitioner steadfastly refused to permit him to return to work.

During the period when Respondent was trying to obtain permission to return to work, Petitioner first assigned as the reason for refusal, Dr. Sublett's "examination" of Respondent. However, after Respondent was examined by other doctors and tendered to Petitioner the reports of such examinations showing him to be in good health and sound physical condition, Petitioner then assigned as an additional reason for denying Respondent return to work, the fact that Respondent was receiving annuities from the Railroad Retirement Board. Thereupon, Respondent redoubled his efforts to get the Railroad Retirement Board to discontinue such payments, so that they would not inter-

fere with his return to work (R. 90-93, 95, 307-308), including trips to such Board's offices in Chicago; but he was assured by the Railroad Retirement Board that his payments should not stop until he had returned to work and thus his receipt of such would not prejudice his right to return to work. (R. 92-93, 95.) Despite his efforts to have such annuities stopped, the Railroad Retirement Board continued to send them to him; and this, despite the fact that in October, 1951, an examination of Respondent by a doctor at the request of the Railroad Retirement Board failed to reveal any evidence of continuing disability (R. 330, 743-745), resulting in a letter from the Railroad Retirement Board to the Petitioner, requesting that Petitioner call Respondent for further examination with a view to returning him to work. (R. 830, 831.) Such request was never complied with.

On December 3, 1951, Petitioner's Assistant Secretary forwarded such request to Dr. C. M. Sublett at Kingsville, Texas, with his own letter of transmittal, instructing Dr. Sublett to handle and reply to such request by the Railroad Retirement Board "in accordance with our conversation of June 14, 1950." (R. 834.) The "conversation of June 14, 1950," referred to, occurred almost a year before Respondent first sought to return to work on February 15, 1951. By letter dated December 10, 1951, Dr. Sublett replied to the Railroad Retirement Board, stating he had *reviewed* Respondent's record and that, in view of such material in the file, he would not re-instate Respondent as a conductor, sending a copy of such letter to Petitioner's Assistant Sec-

retary and a copy to the Superintendent. (R. 835, 836.) Dr. Sublett did not re-examine Petitioner as requested by the Board, and in fact, did not even communicate with him about it. (R. 838, 839.)

After nearly two years of earnestly and sincerely trying to convince his employer that he was physically able to perform the duties of his employment so that he might work to earn his livelihood, and reflecting upon the reasons given for refusing him that right, as well as the apparent and implicit activities of the Company to influence the Railroad Retirement Board with regard to the continued sending of annuity payments to him, Respondent finally concluded that the statement made to him by Dr. Sublett (Petitioner's surgeon at Kingsville, Texas), in February, 1951, to the effect that regardless of Respondent's physical condition, he would not be permitted to work on the railroad, was correct; that the Company (Petitioner) intended not to permit him to resume his work at his employment, regardless of his physical ability. Thereupon, prior to February, 1953, he filed this action for damages for wrongful discharge. (R. 11.)

Respondent was present before the trial court for five days, during which time the Trial Judge and the jury had full opportunity to observe him, his physical appearance and his manner of conduct, as well as to hear his testimony. (R. 3, 4, 239-427, 1021.)

Trial was to a jury beginning on January 25, 1954 (R. 3, 220), at the conclusion of which the jury's verdict on Special Issues was received, accepted and filed on January

29, 1954. (R. 217-219.) Respondent duly filed and presented Alternative Motions for Judgment (R. 1060), and on April 12, 1954, the Court rendered his Corrected Judgment for Respondent against Petitioner for the sum of $6,960, being the damages which the jury found Respondent had sustained to the date of trial. (R. 217-219, 1082.) Appeal and cross-appeal were duly taken to the United States Court of Appeals for the Fifth Circuit, at New Orleans (R. 1109, 1110), where the judgment was affirmed (please see page 57 of Petitioner's Petition for Writ of Certiorari).

INACCURACIES IN PETITION FOR WRIT OF CERTIORARI

Petitioner makes several inaccurate statements in his Petition, which Respondent is constrained to specifically point out:

(1) On pages 5, 23 and 27 of such Petition for Writ of Certiorari, Petitioner states that Sheffield, in his letter of May 29, 1952, addressed to Respondent, informed Respondent that if Petitioner's doctor advised that Respondent was physically fit, it would be satisfactory for him to return to work "*if he passed the safety rules examination.*" As will be readily seen by inspection of the letter referred to (R. 321 and also Petition for Writ of Certiorari, Appendix, p. 34), such statement is incorrect. Nowhere in that letter are the words "safety rules examination" found.

Such communication required that Respondent "*pass the other requirements*," without limitation or specification, and especially without limiting such requirements to "safety rules examination."

(2) On page 17, Petitioner says that the written agreement (meaning the Collective Bargaining Contract involved) contained no provision for submitting the question of Respondent's physical ability to a board of three doctors, and then adds the statement "*but plaintiff took the position that by custom it had become a part of the agreement.*" Such added statement is without support in the record and has no foundation in fact.

(3) On page 7 of said Petition (in Statement of the Case) and again on page 23 (in Argument), Petitioner says that the jury found that Respondent was disabled at the time that he applied to the Superintendent on all pertinent dates prior to May 29, 1952. The jury did not so find. The Court charged the jury (R. 1035) that plaintiff has the burden to "establish affirmative answers to the Special Issues * * * by a preponderance of the evidence." The only effect of the jury's negative answers as to dates prior to May 29, 1952, was that plaintiff failed to meet that burden to the jury's satisfaction. This is elementary.

QUESTIONS PRESENTED BY PETITION FOR WRIT OF CERTIORARI

Petitioner's Petition for Writ of Certiorari and his brief in support thereof present only four questions, although

some are presented in various shades. Such four questions are:

1. Does the Railway Labor Act abrogate a discharged railroad employee of his common law remedy of an action for damages for wrongful discharge?

2. Under the law in Texas, is a wrongfully discharged railroad employee required to pursue available administrative remedies as a prerequisite to an action in court for damages for wrongful discharge?

3. Does the receipt by Respondent of annuity benefits from the Railroad Retirement Board, under the facts in this case, deprive Respondent of redress for his wrongful discharge?

4. Was Respondent wrongfully discharged by Petitioner?

RESPONDENT'S PROPOSITIONS

I.

The Railway Labor Acts does not deprive the courts of jurisdiction of actions by railroad employees for damages for wrongful discharge.

II.

The law in Texas does not require Respondent to exhaust administrative remedies as a prerequisite to action in court for recovery of damages for wrongful discharge.

III.

Receipt by Respondent of annuity benefits from the Railroad Retirement Board during the time Petitioner

arbitrarily kept him from working does not preclude Respondent from recovering his damages for wrongful discharge.

IV.

The record containing substantial evidence (if not conclusive) to support the jury's finding of wrongful discharge of Respondent by Petitioner, such finding is binding upon the Supreme Court.

PROPOSITIONS RESTATED

I.

The Railway Labor Acts does not deprive the courts of jurisdiction of actions by railroad employees for damages for wrongful discharge.

ARGUMENT

Petitioner's contention that the Railway Labor Act, U. S. C. A. Title 45, deprives the courts of jurisdiction of actions for damages for wrongful discharge, and deprives employees of such remedy, is untenable.

Prior to the enactment of the Railway Labor Act, there existed, at least under Texas law, no remedy by way of specific performance of a contract for personal service. *Consolidated Indemnity Insurance Co. v. Smith (Tex. Civ. App.), 74 S. W. 2d 139; Kennon v. Schlesinger (Tex. Civ. App.), 182 S. W. 2d 373, error refused.*

Enactment of the Railway Labor Act created such specific performance remedy, and established the National Railroad Adjustment Board to administer it. *U. S. C. A. Title 45, Ch. 8, Sec. 153.* That Board has exclusive jurisdiction of a complaint of a wrongfully discharged railroad employee who has elected to stand on his contract and seeks restoration to duty with full seniority and back pay. *Butler v. Thompson (C. A. Mo., 1951), 192 Fed. 2d 831; Buster v. Chi. M. St. P. & P. Ry. Co. (C. A. Ill., 1952), 195 Fed. 2d 73.* The National Railroad Adjustment Board has no jurisdiction to entertain an action for, or to award a recovery of damages for wrongful discharge.

But the creation of such new remedy in the industry and the establishment of the National Railroad Adjustment Board to administer it, did not abrogate nor impair the common law remedy of action for damages for wrongful discharge; nor did it divest the courts of jurisdiction to entertain such actions. Since the enactment of the Railway Labor Act, a wrongfully discharged railroad employee has an election of remedies. He may stand on his contract and take his grievance to the Railroad Adjustment Board for relief by way of restoration to duty, with full seniority unimpaired and for wages for time lost; or, he may elect to stand on breach and bring his action in court for damages for the wrongful discharge. *Moore v. Ill. Cent. R. Co., 61 S. Ct. 754, 312 U. S. 630, 85 L. Ed. 1089; Michel v. Louisville & N. R. Co. (1951), 188 Fed. 2d 224; Priest v. Chi. R. I. & P. RR. Co. (C. A. Ark., 1951), 189 Fed. 2d 813; Newman v. Balt. & O. R. Co. (C. A. Pa., 1951),*

191 Fed. 2d 560; Oswald v. Chi. B. & Q. Ry. Co. (C. A. Ia., 1952), 200 Fed. 2d 549; Watson v. M. K. & T. Ry. Co. (Tex. Civ. App.), 173 S. W. 2d 357 (no Writ of Error history); Kendall v. Penn. R. Co. (D. C. Ohio, 1950), 94 Fed. Supp. 875; Swartz v. Sou. Buffalo Ry. Co. (D. C. N. Y., 1942), 44 Fed. Supp. 447; Youmans v. Charleston & W. Ry. Co. (S. Car.), 178 S. E. 671.

Therefore, Respondent properly brought this action in court, and the Trial Court correctly assumed jurisdiction thereof.

II.

The law in Texas does not require Respondent to exhaust administrative remedies as a prerequisite to action in court for recovery of damages for wrongful discharge.

ARGUMENT

The Supreme Court of the State of Texas has settled the law in Texas upon this point in the case of *Texas & New Orleans Railroad Co. v. McCombs, 143 Tex. 237, 183 S. W. 2d 716*, in which case that court holds that not only is the employee not required to exhaust administrative remedies, but that he is not required to resort to any such available remedies. Petitioner cites a number of opinions by some of the Texas Courts of Civil Appeals, none of which are in point upon the facts involved, and none of which have the effect of changing the rule as laid down by the Texas Supreme Court.

III.

Receipt by Respondent of annuity benefits from the Railroad Retirement Board during the time Petitioner arbitrarily kept him from working does not preclude Respondent from recovering his damages for wrongful discharge.

ARGUMENT

Petitioner cites authorities to the effect that an employee cannot claim wages for a period during which he drew pay for services in another assignment. Such cases are not in point. Respondent has not sued for nor recovered wages. This suit is for damages for wrongful discharge.

The record contains considerable undisputed evidence of Respondent's efforts to get the Railroad Retirement Board to stop sending him annuity payments as soon as he learned that Petitioner assigned that as an additional reason for denying him the right to return to work. Among other things, he made two trips to the Board's regional office at Dallas, Texas, and two trips to the main offices at Chicago, Illinois (R. 82, 90-96), on each of which occasions he requested that the payments be stopped so that it would not interfere with his return to work. (R. 83, 90, 92, 96.) He was assured by the Board that he was entitled to the payments until he should return to work; that the Board has means to recover erroneous payments. (R. 92, 93.) Correspondence with the Board resulted in his examination by Dr. A. C. Jones in November, 1951, at the Board's request. (R. 743, 744.) Dr. Jones found and reported Re-

spondent to be in good health and good physical condition. (R. 330, 754.) Thereupon, by letter dated November 28, 1951, the Retirement Board informed Petitioner that its examination of Respondent disclosed no continuing disability, and requested that Petitioner call him for re-examination with a view to returning him to work. (R. 830, 831.) Petitioner's Assistant Secretary of the railroad forwarded the Board's letter and request to Dr. C. M. Sublett at Kingsville, Texas, with instructions to handle it "in accordance with our conversation of June 14, 1950." In pursuance of that instruction, Dr. Sublett neglected to call Respondent for re-examination, did not examine him, and replied to the Retirement Board that upon *review of Respondent's record*, he declined to return him to work. (R. 835, 836.)

Considerable pre-trial proceedings were had, and this feature of the case was thoroughly developed (R. 37-57, 58-63, 64-75) and the Trial Court properly found that Respondent had done all that was required of him to have such annuity payments stopped, if such were necessary to protect his right to return to work under his employment contract. (R. 128-141, 422.)

But it was not necessary that such payment be stopped before Respondent returned to work. He was receiving such payments under U. S. C. A. Title 45, Ch. 9, Section 228b(a) par. 4(ii). (R. 322.) That section of the Retirement Act further provides:

> "If before attaining the age of sixty-five an employee in receipt of an annuity under paragraph 4 or

> 5 of this subsection is found by the Board to be no longer disabled as provided in said paragraphs *his annuity shall cease upon the last day of the month in which he ceases to be so disabled.*" (Emphasis added.)

Thus it is seen that an employee must return to work before his annuity payments stop; and that it is legally proper for an employee to receive and keep disability annuity for the same period during which he may draw pay for work after returning to work from disability lay-off.

Respondent was under sixty-five years of age at the time of trial. (R. 241, 242.)

Therefore, when Petitioner sought to impose upon Respondent the requirement that he cease receiving remittances from the Retirement Board as a prerequisite to permission to return to work, Petitioner undertook to deprive Respondent of what he was legally entitled to receive, which action in itself was arbitrary.

Attention is invited to the provisions of Section 228i(a) of Title 45, U. S. C. A., which provides for recovery by the Railroad Retirement Board of payment erroneously made; and also Section 228i(c) of the same title, which provides that there shall be no such recovery of erroneous payments when made, in the judgment of the Board, without fault upon the part of the recipient, or when recovery would be against equity or good conscience.

It is submitted, therefore, that the receipt by Respondent of annuity payments does not preclude his recovery of his

damages for wrongful discharge; and that the Trial Court and the Court of Appeals correctly so held.

IV.

The record containing substantial evidence (if not conclusive) to support the jury's finding of wrongful discharge of Respondent by Petitioner, such finding is binding upon the Supreme Court.

ARGUMENT

Trial to the jury began on January 25, 1954 (R. 220), and the introduction of evidence was completed on January 28, 1954 (R. 1024). The bulk of the testimony given during those four days consisted of the overwhelming medical evidence showing Respondent's physical ability to perform the duties of his employment (R. 330, 429, 464, 514, 544, 558, 568, 594), being the testimony of various medical experts concerning their examinations of Respondent, showing him to be physically able to perform his work; as against the perfunctory examination of him by Dr. Sublett upon which the latter turned Respondent down. (R. 272-274.) Dr. Sublett, using profanity, informed Respondent that Petitioner would not permit him to return to work regardless of his physical condition. (R. 269, 270.) Dr. Sublett, although a witness, did not deny such testimony.

The proof further shows that Respondent proposed that he be examined by a doctor or doctors (other than Sublett) of Petitioner's choice, at Respondent's expense, and that the parties abide by their findings as to his physical ability to perform the duties of his employment. (R. 316.) This

offer was declined, although B. W. Proctor, Petitioner's Assistant Chief of Personnel, wrote a letter to Assistant General Manager Sheffield saying he thought such would be a fair procedure. (R. 1014.) Sheffield, who had the authority to accept or reject such proposal, rejected it, imposing new and additional requirements. (R. 321-322.) The jury thought these were arbitrary.

Attention is again invited to the correspondence between the Railroad Retirement Board, C. A. Rockwell, Petitioner's Assistant Secretary, and Dr. C. M. Sublett, with reference to the Retirement Board's request for a re-examination of Respondent in November, 1951, and the manner in which such request was handled "in accordance with our conversation of June 14, 1950." (R. 830, 831, 834-836, 838-839.)

Petitioner does not say—he can not say that there is not substantial evidence to support the jury's verdict. The evidence is overwhelmingly in support of the verdict. What Petitioner says, in effect, is that the jury has misconstrued the evidence.

Whether or not there was a wrongful discharge is a fact question. The jury, on substantial evidence, has found there was a wrongful discharge; and that finding is binding upon this Honorable Court. *U. S. v. Johnson, 66 S. Ct. 464, 327 U. S. 106, 90 L. Ed. 414, reh. den. 66 S. Ct. 699, 327 U. S. 817, 90 L. Ed. 1040; Loews, Inc. v. Cinema Amusements Co., Inc., 210 Fed. 2d 86, Cert. Den. 74 S. Ct. 787, 347 U. S. 976, 98 L. Ed. ....*

CONCLUSION

In conclusion, Respondent submits that Petitioner's Petition for Writ of Certiorari presents no maintainable ground for the issuance of the Writ; wherefore, such Petition for Writ of Certiorari should be in all things denied; and Respondent respectfully so prays.

Respectfully submitted,

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I hereby certify that a copy of this Brief has been mailed to opposing Counsel of Record with proper address and sufficient postage, this 7th day of September, 1954.

David H. Nutt

DAVID H. NUTT.